Marine Environmental Update

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FWS Promulgates Final Critical Habitat Rule For Endangered, Threatened Plants On Oahu, Hawaii

On June 17, 2003, the Fish & Wildlife Service designated approximately 55,040 acres – mostly within Oahu's Koolau and Waianae Mountains – as critical habitat for 99 threatened and endangered plant species. The total acreage is less than half that originally proposed (see *Marine Environmental Update*, Vol. FY02, No. 3). The critical habitat designation was completed in response to a lawsuit filed by Earth Justice on behalf of the Conservation Council for Hawaii, the Sierra Club, and the Hawaiian Botanical Society.

The final rule establishes 303 single-species critical habitat units that overlap to form 36 multiple-species units. Of the total acreage designated as critical habitat, 41 percent is owned by State or local agencies, 49 percent by private landowners, and 10 percent by the Federal government. Lands managed by the U.S. Navy in Lualualei Valley and the FWS within the Oahu Forest National Wildlife Refuge are included in the critical habitat designation.

Almost 27,000 acres of U.S. Army training lands were eliminated in the final rule due to the Army's ongoing voluntary conservation efforts. The FWS also considered the potential adverse impacts to national security in making its decision. The Army has completed an Integrated Natural Resources Management Plan, an Ecosystem Management Plan, and an Endangered Species Management Plan for all of their training areas on Oahu. These plans include management activities that benefit all 76 listed plant species presently or historically found on Oahu lands under their jurisdiction, and the

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Army is currently carrying out many of these activities. In addition, the Army has agreed to coordinate with the FWS on any activities that may affect essential habitat areas for these species, even though they are not designated critical habitat.

Some changes in the final rule were based on information provided during the public comment periods regarding the proposed rule or gathered during field visits by FWS staff. Areas that did not provide the habitat elements needed by the species or are not essential for the conservation of the species were eliminated in the final rule. Forty-five of the species are or were historically found on other Hawaiian islands and, in some cases, a species' conservation needs would be better met on other islands rather than on Oahu.

An addendum to the draft economic analysis for Oahu plant critical habitat indicated quantifiable direct costs related to consultation under Section 7 of the Endangered Species Act have increased to $8.3 million to $20.3 million over a period of 10 years, primarily due to revised estimates associated with consultations on Army lands. Since these Army lands have now been eliminated in the final rule, quantifiable costs are likely to be within the range of $236,300 to $911,000 over the 10-year period. No areas were excluded from critical habitat because of their economic costs.

Further information and associated documents can be found at: http://pacificislands.fws.gov.

Federal Register, Volume 68, Number 116, Tuesday, June 17, 2003, pp. 35949-36406 (1.55 MB text file or 10.9 MB Adobe™ Acrobat™ file).

U.S. Fish & Wildlife Press Release, June 17, 2003.

NMFS Rejects Petition To Revise Northern Right Whale Critical Habitat

On July 11, 2002, the National Marine Fisheries Service received a petition from the Ocean Conservancy requesting that it revise the present critical habitat designation for the western North Atlantic right whale, *Eubalaena glacialis*, under the Endangered Species Act by expanding its boundaries in both the Northeast and Southeast U.S. The petitioner requested that the NMFS expand the existing Southeast critical habitat designation to the following coordinates: 31° 30′ N to 29° 40′ N from the shoreline out to 30 nautical miles; 29° 40′ N to 28° 00′ N from the shoreline out to 10 nautical miles. The petitioned area would add approximately 2,700 nm^2 (5,003.6 km^2) to the current critical habitat coverage.

The Ocean Conservancy also requested that the NMFS expand and combine both the existing Northeast critical habitat designations (Cape Cod Bay and Great South Channel) into one critical habitat area bounded by the following coordinates: 41° 41.2′N/69° 58.2′W; 41° 00.0′N/69°05.0′W; 41° 00.0′N/68° 13.0′W; 42°12.0′N/68° 13.0′W; 42° 12.0′N/70°30.0′W; 41° 46.8′N/70° 30.0′W; and on the southwest corner by the shoreline of Cape Cod, MA. The NMFS determined that the requested revision, as specified by the petitioner, was not warranted at this time. Selected background documents on right whales and the

critical habitat designation process can be downloaded from the NOAA Fisheries Web Site at http://www.nmfs.noaa.gov/.

Federal Register, Volume 68, Number 167, Thursday, August 28, 2003, pp. 51758-51763 (41.1 KB text file or 55.2 KB Adobe™ Acrobat™ file).

Petition to List Northern and Florida Panhandle Loggerhead Sea Turtle as Endangered Rejected

On September 15, 2003, the Fish & Wildlife Service and the National Marine Fisheries Service rejected a petition to reclassify the Northern and Florida Panhandle subpopulations of the loggerhead sea turtle (*Caretta caretta*), now listed as threatened throughout its range, as distinct population segments (DPSs) with endangered status and to designate critical habitat under the Endangered Species Act of 1973 as amended. The FWS and NMFS found that the Northern and Florida Panhandle loggerhead subpopulations did not meet the criteria for classification as DPSs, and the petitioned action was not warranted.

The petition finding, supporting data, and comments are available for public inspection, by appointment, during normal business hours at the Protected Resources Division, NMFS Southeast Region, 9721 Executive Center Drive North, St. Petersburg, FL 33702. For further information contact David Bernhart, NMFS Southeast Region, telephone: (727) 570-5312, facsimile: (727) 570-5517, e-mail: David.Bernhart@noaa.gov; or Barbara Schroeder, NMFS Office of Protected Resources, telephone: (301) 713-1401, facsimile: (301) 713-0376, e-mail: barbara.schroeder@noaa.gov.

Federal Register, Volume 68, Number 178, Monday, September 15, 2003, pp. 53947-53955 (59.9 KB text file or 68.2 KB Adobe™ Acrobat™ file).

Critical Habitat For Vernal Pool Crustaceans, Plants In California, Southern Oregon Designated

On August 6, 2003, the Fish & Wildlife Service designated critical habitat pursuant to the Endangered Species Act of 1973 for four vernal pool crustaceans and 11 vernal pool plants. The species included are the Conservancy fairy shrimp (*Branchinecta conservatio*), longhorn fairy shrimp (*B. longiantenna*), vernal pool tadpole shrimp (*B. lynchi*) and vernal pool fairy shrimp (*Lepidurus packardi*). The plants are the Butte County meadowfoam (*Limnanthes floccosa* ssp. *californica*), hairy Orcutt grass (*Orcuttia pilosa*), slender Orcutt grass (*O. tenuis*), San Joaquin Valley Orcutt grass (*O. inaequalis*), Sacramento Orcutt grass (*O. viscida*), Solano grass (*Tuctoria mucronata*), Greene's Tuctoria (*T. greenei*), Colusa grass (*Neostapfia colusana*), succulent (or fleshy) owl's clover (*Castilleja campestris* ssp. *succulenta*),

Hoover's spurge (*Chamaesyce hooveri*) and Contra Costa goldfields (*Lasthenia conjugens*). The vernal pool fairy shrimp, is also found in Oregon.

A total of approximately 1,184,513 ac (417,989 ha) of land falls within the boundaries of designated critical habitat. The final designation represents a reduction in acreage from the approximately 1.7 million acres the Service proposed as critical habitat in September 2002. The reduction is due to:

- Refined mapping techniques, which resulted in a more accurate assessment of habitat lands compared to developed agricultural or urban lands;
- Exclusions of Tribal and military lands, lands under Habitat Conservation Plans, National Wildlife Refuges and National Fish Hatcheries, and State ecological lands and wildlife management areas;
- Clarified and updated biological information; and
- The exclusion of all lands in Butte, Madera, Merced, Sacramento and Solano counties in California due to the potential economic effect of critical-habitat designation in those areas.

In its final economic analysis, the Service found that the listing of the 15 vernal pool species and the critical habitat designation could potentially impose total economic costs for consultation and modifications to projects of $1.3 billion over 20 years. The final rule is effective September 5, 2003.

Federal Register, Volume 68, Number 151, Wednesday, August 6, 2003, pp. 46683-46867 (916 KB text file or 4.94 MB Adobe™ Acrobat™ file).

Fish and Wildlife Service Press Release, August 6, 2003.

EPA Finalizes Guidelines For Establishing Test Procedures For Analysis Of Biological Pollutants In Ambient Water

On July 21, 2003, the Environmental Protection Agency issued a final rule approving test procedures at 40 CFR Part 136 (analytical methods) for the following bacteria and protozoa: *Escherichia coli*, enterococci, *Cryptosporidium*, and *Giardia* (see also TECHNICAL CORRECTION reference, below). The action promulgated the test methods described in the proposed rule (66 FR 45811, August 30, 2001) for the analysis of *E. coli*, enterococci, *Cryptosporidium*, and *Giardia* in ambient water; the final rule did not approve these methods for use in analyzing wastewater effluent.

For *E. coli*, approved methods include most probable number methods (LTB → EC–MUG, ONPG–MUG) and membrane filtration methods (mENDO → NA–MUG, LES–ENDO → NA–MUG, mFC → NA–MUG, mTEC agar, Modified mTEC agar, MI agar, m-ColiBlue 24 broth). For enterococci (which include *Enterococcus faecalis* and *Enterococcus faecium*), approved methods include most probable number methods (Azide-Dextrose/PSE/BHI, MUG) and membrane filtration methods (mE → EIA agar, mEI agar). For *Cryptosporidium*, the EPA approved Methods 1622 and 1623. For *Giardia*, the EPA approved Method 1623.

The proposed rule (see *Marine Environmental Update*, Vol. FY01, No. 4) indicated that the EPA intended to issue guidance on the assessment of method comparability in conjunction with the final rule. In the record for the final rule, the EPA made available the latest version of the guidance document, the *EPA Microbiological Alternate Test Procedure (ATP) Protocol for Drinking Water, Ambient Water, and Wastewater Monitoring Methods, Guidance* (EPA 821-B-03-004). Under the EPA's ATP program, any person may apply for approval of the use of an ATP or new method to test for a regulated analyte. The EPA anticipates that the standardized ATP procedures described in the guidance should generally expedite the approval of ATPs and encourage the development of innovative methods for compliance monitoring under the National Pollution Discharge Elimination System (NPDES) permit program.

In addition to the ATP process, the guidance describes the process for conducting side-by-side method comparisons and for conducting quality control (QC) acceptance criteria-based method studies for the EPA-designated reference methods with QC acceptance criteria. The guidance document serves as a supplement to the ATP program requirements specified at 40 CFR 136.4, 136.5, and 141.27. The guidance document may be revised in the future based on comments received from persons using the guidance, as appropriate.

For further information contact Robin K. Oshiro, U.S. EPA Office of Water, Engineering and Analysis Division (4303T), 1200 Pennsylvania Avenue, Washington, D.C. 20460; e-mail: Oshiro.Robin@epa.gov; or see http://www.epa.gov/waterscience/methods/biological/index.html.

Federal Register, Volume 68, Number 139, Monday, July 21, 2003, pp. 43271-43283 (77.6 KB text file or 145 KB Adobe™ Acrobat™ file).

Federal Register, Volume 68, Number 182, Monday, September 19, 2003, p. 54934 (TECHNICAL CORRECTION – 1.79 KB text file or 18.9 Adobe™ Acrobat™ file).

EPA Survey Of States, Tribes, And Territories Nutrient Standards

In July, 2003, the Environmental Protection Agency released the *Survey of States, Tribes, and Territories Nutrient Standards*. This survey is a follow up to a 1994 survey to evaluate the progress made by States and tribes in adoption of nutrient criteria in their Water Quality Standards and to determine the current status of state nutrient criteria.

All States, territories and tribes were reviewed to determine if they have adopted nutrient criteria in their Water Quality Standards. Every state had narrative standards that protected waters from objectionable conditions, such as floating material, which can be used to indicate nutrient problems. Other states had narrative nutrient standards, which specifically mentioned eutrophication as a problem to be prevented in their narrative nutrient standard. In some states a translator such as the Trophic State Index (TSI) is used to indicate areas where eutrophication may be a problem.

Numeric criteria for turbidity was the most common nutrient parameter. In this survey, the turbidity values were recorded but not analyzed to determine if they were used for nutrient enrichment protection

or for other endpoints. The next most common numeric nutrient criteria was total phosphorus in lakes and rivers. Some states had chlorophyll *a* criteria for specific water bodies such as lakes and reservoirs. Total nitrogen standards for lakes and rivers are adopted in a few states. Secchi depth standards were found in some Water Quality Standards.

The ecoregion-specific nutrient criteria development process recommended by the EPA was used by some states in developing criteria. All four recommended parameters (total phosphorus, total nitrogen, chlorophyll *a* and water clarity) were adopted in two states, specifically in lakes. There were three nutrient trading programs established, two of which were incorporated on specific river basins and one was on a statewide level.

Tribes and territories have also adopted nutrient standards. All the tribes that have Water Quality Standards have incorporated some guideline values for nutrient parameters. Often the tribes have adopted one numeric nutrient criteria that is applicable to all waterbodies occupied by the tribe.

The document can be accessed at: http://epa.gov/waterscience/criteria/nutrient/statesummary.htm (2.3 MB Adobe™ Acrobat™ file).

U.S. EPA Office of Water. Survey Of States, Tribes And Territories Nutrient Standards. U.S. EPA Office of Water, July 2003.

EPA To Withdraw Federal Aquatic Life WQC For Copper, Nickel Applicable To South San Francisco Bay

On June 25, 2003, the Environmental Protection Agency proposed to withdraw site-specific aquatic life water quality criteria for copper and nickel applicable to south San Francisco Bay, California (the area of San Francisco Bay that is located south of the Dumbarton Bridge). On May 18, 2000, the EPA promulgated Federal regulations establishing water quality criteria for priority toxic pollutants for the State of California known as the California Toxics Rule (CTR; see *Marine Environmental Update*, Vol. FY00, No. 3). On May 22, 2002, the California Regional Water Quality Control Board, San Francisco Bay Region (RWQCB), adopted amendments to its Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan). The amendments contained copper and nickel aquatic life water quality criteria for south San Francisco Bay.

The California State Water Resources Control Board (SWRCB) and Office of Administrative Law (OAL) then reviewed and approved the Basin Plan amendments containing the site-specific objectives. On January 9, 2003, the SWRCB submitted the Basin Plan amendment containing the site-specific objectives to EPA Region 9 for review and approval. On January 21, 2003, EPA Region 9 approved the copper and nickel aquatic life site-specific objectives for south San Francisco Bay.

Since the State of California now has aquatic life site-specific objectives for copper and nickel for south San Francisco Bay, the EPA determined that the Federally-promulgated copper and nickel aquatic life

criteria are no longer needed for south San Francisco Bay. Therefore, the EPA proposed to withdraw the copper and nickel aquatic life criteria for south San Francisco Bay from the CTR.

Federal Register, Volume 68, Number 122, Wednesday, June 25, 2003, pp. 37925-37929 (26.0 KB text file or 103 KB Adobe™ Acrobat™ file).

USCG Proposes Mandatory Ballast Water Management Program For Vessels In U.S. Waters

On July 30, 2003, the U.S. Coast Guard proposed mandatory ballast water management (BWM) practices for all vessels equipped with ballast tanks bound for ports and places within the U.S. and/or entering into U.S. waters. The Great Lakes ballast water management program would remain unchanged. The proposed rulemaking is intended to increase the Coast Guard's ability to protect U.S. waters against the introduction of nonindigenous species via ballast water discharges.

As directed by the National Invasive Species Act of 1996 (see *Marine Environmental Update*, Vol. FY97, No. 2), and as a result of the Secretary of Transportation's Report to Congress in June 2002, the Coast Guard determined that the voluntary BWM program was inadequate. Therefore, the Coast Guard proposed to convert the voluntary BWM program into a mandatory BWM program. The proposed rulemaking would revise 33 CFR part 151 to implement the requirements of NISA. Specifically, subpart D of 33 CFR part 151 would be revised to require a mandatory ballast water management program for all vessels equipped with ballast water tanks entering U.S. waters. The mandatory ballast water management requirements for vessels entering into the Great Lakes and Hudson River from outside the U.S. Exclusive Economic Zone (EEZ) would remain unchanged.

Pursuant to Section 1103(a) of the National Invasive Species Act (16 U.S.C. 4713), the mandatory measures proposed by the Coast Guard do not apply to Department of Defense vessels. Ballast water management guidance for Navy ships is provided in Section 19-10 of OPNAVINST 5090.1B.

The mandatory program would require all vessels equipped with ballast water tanks entering U.S. waters after operating beyond the EEZ to employ at least one of the following ballast water management practices:

- Prior to discharging ballast water in U.S. waters, perform complete ballast water exchange in an area no less than 200 nautical miles from any shore.
- Retain ballast water onboard the vessel.
- Prior to the vessel entering U.S. waters, use an alternative environmentally sound method of ballast water management that has been approved by the Coast Guard.
- Discharge ballast water to an approved reception facility.

Although the national mandatory BWM program provides vessels with the option of using one of four BWM practices, ballast water exchange is likely to be the most used practice. A vessel would not be required to deviate from its voyage, or delay the voyage, in order to conduct a ballast water exchange. The proposed rule also revises the criteria for a mid-ocean exchange by removing the constraint of exchanging ballast water in waters more than 2000 meters deep. The Coast Guard proposes to define mid-ocean ballast water exchange as taking place not less than 200 miles from shore allows more vessels to conduct exchange and simplifies enforceability.

Failure to employ at least one of the BWM practices outlined above, to maintain a BWM plan onboard the vessel, or to make the required ballast water reports available will result in penalties, unless the vessel is exempt due to safety or voyage constraints, or specifically exempted by regulation. A BWM plan should be specific to each vessel, and should fulfill two purposes: (1) Show that there is a BWM strategy for the vessel; and (2) allow any master, or other ship's officer as appropriate, serving on that vessel to understand and follow the BWM strategy for that vessel.

Federal Register, Volume 68, Number 146, Wednesday, July 30, 2003, pp. 44691-44696 (38.1 KB text file or 64.7 KB Adobe™ Acrobat™ file).

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